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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE B. DRESCHER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

On June 28, 1950, the taxpayer filed a petition for a writ of certiorari in *Theodore B. Drescher* v. *United States,* No. 158, seeking review of those parts of the judgment entered in the case which were unfavorable to the taxpayer. A brief in opposition to this petition is being filed by the United States setting forth the reasons why the case does not merit further review.

The Solicitor General, on behalf of the United States, prays in the event that the Court should grant the petition for a writ of certiorari in No. 158, but only in that event, that a cross-writ of cer-

tiorari issue to review those portions of the judgment below which were not favorable to the United States. The entire record in No. 158 includes the record upon which this cross-petition is based.

OPINIONS BELOW

The opinion of the District Court (R. 8-11) is reported at 84 F. Supp. 228. The opinion of the Court of Appeals (R. 125-131) and the opinion of Judge Clark, dissenting in part (R. 131-135) are reported at 179 F. 2d 863.

JURISDICTION

The judgment of the Court of Appeals was entered on February 16, 1950. (R. 135.) By order of Mr. Justice Jackson, dated May 3, 1950, the time within which the United States might file a petition for a writ of certiorari was extended until July 15, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED

1. Did the court below err in failing to hold, on the basis of the present record, that the taxpayer received taxable income in the amount of the premium actually paid by the taxpayer's employer in purchasing annuity contracts for him, and in remanding the case for further proceedings to permit the lower court to determine the amount of the income received by the taxpayer?

2. Did the court below err in holding that an annuity contract, dated December 28, 1940, mailed

on December 31, 1940, but not received until January, 1941, was not effective until 1941 and did not constitute income to the taxpayer in 1940?

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth at pp. 3-6 of the brief for the United States in opposition in No. 158.

STATEMENT

The pertinent facts in the case are set forth at pp. 6-9 of the brief for the United States in opposition in No. 158, and will not be repeated here.

REASONS FOR GRANTING THE WRIT

1. The court below, while accepting the Government's contention that the taxpayer received taxable income when his employer purchased single premium annuity contracts for him, refused to hold, on the present record, that the amount of taxable income realized by the taxpayer was equal to the premiums paid by the employer, although this was the amount which the Commissioner, in his deficiency determination, had determined should be included in income. Instead, it remanded the case to the District Court to permit it to determine the value of what the taxpayer received.[1]

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[1] The taxpayer, in his petition in No. 158, repeatedly assumes (Pet. 4-5, 9, 14), that the court below held that the amount of the income received by the taxpayer was less than the amount of the premiums paid by the employer and that, on the remand, the District Court will be required to find such a lesser value. We believe that the taxpayer's assumptions are altogether unjustified. A fair reading of

Since the court below recognized that the burden of proof was on the taxpayer, and since it also recognized that the taxpayer had failed to establish that the amount of the income received by the taxpayer was less than the amount which the Commissioner had determined was includible in income, namely, the actual cost of the annuity contracts to the employer, it should have upheld the Commissioner's deficiency determination under well established principles regarding the burden of proof. *United States* v. *Anderson,* 269 U. S. 422. In this respect, the present case is indistinguishable from, and is in conflict with, *Oberwinder* v. *Commissioner,* 147 F. 2d 255 (C. A. 8th), where the court held that, in the absence of proof to the contrary, the amount of income realized was the same as that determined by the Commissioner, namely, the premium cost of the nonassignable annuity contract purchased by the employer.

There is an additional reason why the Court of Appeals ought not to have remanded the case. The claims for refund filed by the taxpayer (Stip., Exs. G, H) [2] only asserted that the annuity contracts did not constitute taxable income. There

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the court's opinion and of the opinion of Judge Clark, who dissented in part, is convincing that the lower court is free, on the remand, to determine the question of value in accordance with the facts established and that, if the taxpayer fails to establish any lesser value, the Commissioner's determination will stand.

[2] While these exhibits were not printed in the appendix record below, they were part of the record before the Court of Appeals, which record is now on file with the Clerk of this Court.

was no claim that, in the alternative, they represented income of an amount less than that determined by the Commissioner. Indeed, such an argument was not even advanced by the taxpayer in the court below and there was no opportunity to show that such a contention would have been beyond the scope of the refund claims. By now permitting the taxpayer, assuming that to be possible, to prove a value less than that determined by the Commissioner, the court below, while not considering the point, has, in effect, made it possible for the taxpayer to obtain a refund on grounds not stated in the claims for refund. Such a result would be in conflict with well recognized rules. *Real Estate Title Co.* v. *United States,* 309 U. S. 13; *Mesta* v. *United States,* 137 F. 2d 426 (C. A. 3d).

2. The court below determined that the annuity contract dated December 28, 1940 (R. 97-100), did not become effective until 1941 and, consequently, represented taxable income realized in 1941, rather than in 1940, as the Commissioner had determined. On the merits, the court's decision is wrong. The District Court had made no ultimate findings with respect to the time when that annuity contract became effective. However, the record is clear that the contract was executed by the insurance company on December 28, 1940 (R. 97-100), that the premium had been paid prior to December 31, 1940, and that on that date the contracts were mailed to the employer by an insurance agency from Phila-

delphia (R. 106). Since the taxpayer had the burden of proof, the court below should have assumed, in the absence of contrary evidence, that the insurance agency was the agent of the employer. This would have made it plain that the contract had been delivered to and received by the taxpayer's agent prior to December 31, 1940, and that, accordingly, it had become effective before that date. Moreover, even if the court below had assumed, despite the lack of warrant in the record for such a conclusion, that the insurance agency was acting as agent of the insurance company, the mailing of the contract on December 31, 1940, would have constituted sufficient delivery to make it effective in that year, even though it was not actually received by the employer until 1941. See *Jones* v. *Metropolitan Life Ins. Co.*, 286 N. Y. Supp. 4 (Sup. Ct.); 1 Couch, *Cyclopedia of Insurance Law* (1929), Secs. 125-127. See also Judge Clark's dissenting opinion, fn. 1. (R. 131-132.) Under any view of the evidence, the contract became effective and the taxpayer's rights became vested in 1940; accordingly, the income was realized in that year.

Also, the taxpayer's refund claim for 1940 (Stip., Ex. H) made no contention that that contract was not effected in 1940. On the contrary, it expressly stated that (p. 3)—"* * * the Insurance Company prior to December 31, 1940 *issued and delivered* to the corporation five separate annuity contracts * * *." [Italics added.] In holding

that the contract had not been delivered in 1940, the court below, while not considering the point, has, in effect, permitted the taxpayer to obtain a refund for that year on grounds which are beyond the claims asserted and which are contrary to the reason advanced by the taxpayer in his refund claim for that year. In this respect, too, the decision below is contrary to accepted principles. *Real Estate Title Co.* v. *United States,* 309 U. S. 13.

CONCLUSION

For the reasons stated, but only if the taxpayer's petition for a writ of certiorari should be granted in No. 158, it is urged that this conditional cross-petition for a writ of certiorari be granted in order that all aspects of these related issues may be reviewed.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

JULY, 1950.

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